

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

ALPHONSO GAINER	§	
VS.	§	CIVIL ACTION NO. 1:05cv557
UNITED STATES OF AMERICA	§	

AMENDED MEMORANDUM ORDER OVERRULING MOVANT'S OBJECTIONS AND
ADOPTING THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION¹

Movant Alphonso Gainer, an inmate confined in the Federal Bureau of Prisons, proceeding *pro se*, brought this motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255.

The court referred this matter to the Honorable Earl S. Hines, United States Magistrate Judge, at Beaumont, Texas, for consideration pursuant to applicable laws and orders of this court. The Magistrate Judge recommends the motion be denied.

The court has received and considered the Report and Recommendation of United States Magistrate Judge filed pursuant to such order, along with the record and pleadings. Movant filed objections to the magistrate judge's Report and Recommendation. This requires a *de novo* review of the objections in relation to the pleadings and the applicable law. *See* FED. R. CIV. P. 72(b).

¹ The court previously entered a Final Judgment denying the motion to vacate without objection. Movant, however, filed objections which were docketed the same day as the Final Judgment but were not considered. Accordingly, the court reopened the action for consideration of movant's objections. Movant subsequently filed a notice of appeal and the appellate court proceeded to address movant's appeal on the merits, denying movant's certificate of appealability. *See United States v. Gainer*, No. 08-41096 (5th Cir. Aug. 20, 2009). The Supreme Court denied movant's petition for writ of certiorari on December 7, 2009. *See Gainer v. United States*, No. 09-7463 (Dec. 7, 2009). Neither court addressed jurisdiction of the action. While the court had jurisdiction to reopen the case when the order was entered, it appears this court lost jurisdiction to reopen the action based on movant's notice of appeal docketed October 10, 2008 because the notice of appeal was dated October 6, 2008. *See* FED. R. APP. PROC. 3(d)(2). In such case, the action should be closed based on the previous judgment, as well as the appellate court judgments denying relief. Alternatively, in the event this court has jurisdiction over the case, the motion to vacate should be denied as set forth in this opinion.

After careful consideration, the court concludes movant's objections should be overruled. For the reasons set forth in the magistrate judge's Report, movant has failed to set forth a meritorious ground warranting relief.

O R D E R

Accordingly, movant's objections are **OVERRULED**. The findings of fact and conclusions of law of the magistrate judge are correct and the report of the magistrate judge is **ADOPTED**. A final judgment will be entered in this case in accordance with the magistrate judge's recommendations.

So **ORDERED** and **SIGNED** this **28** day of **January, 2011**.

A handwritten signature in black ink, appearing to read "Ron Clark", is positioned above a horizontal line.

Ron Clark, United States District Judge